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STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by  
Heselton Construction, LLC Pursuant to 49 C.F.R. Part 26.  
State Project Number 66-645-005/125-020-10 CSAH 45

TRP/279/DBE/2011

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**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

**INTRODUCTION**

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on August 23, 2011 on the request of Heselton Construction, LLC ("Heselton").<sup>1</sup> Minnesota Department of Transportation Office of Civil Rights ("MnDOT OCR") set a DBE participation Project goal of 5% for the State Project Number 66-645-005/125-020-10 CSAH 45 ("Project").<sup>2</sup> Heselton was the apparent low bidder ("ALB") on the Project and submitted documentation to MnDOT OCR indicating that it achieved 0% DBE commitment for the Project and also submitted documentation of its good faith efforts to MnDOT OCR on May 19, 2011.<sup>3</sup>

By letter dated June 23, 2011, MnDOT OCR informed Heselton that it has not demonstrated adequate good faith efforts to meet the Project's DBE goal. Heselton requested a reconsideration of MnDOT OCR's decision.

MnDOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three MnDOT officials. The three panel members had no role in the MnDOT OCR's decision to reject Heselton's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.<sup>4</sup> Erik M. Johnson, Assistant Attorney General represented the MnDOT OCR and Michael E. Heselton and Tom Gorman represented Heselton. Both Heselton and MnDOT OCR had equal opportunities to present their respective positions.

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<sup>1</sup> Letter dated June 30, 2011 from Michael Heselton to Deputy Commissioner Bernard Arseneau.

<sup>2</sup> MnDOT OCR's letter dated June 23, 2011 at p. 1.

<sup>3</sup> Heselton's Certificate of Good Faith Efforts MnDOT OCR exhibit 2.

<sup>4</sup> Notice dated August 4, 2011.

At the hearing, Heselton marked its letter dated June 30, 2011 addressed to Bernard Arseneau, Deputy Commissioner, MnDOT as exhibit 1. MnDOT OCR made its presentation based on an outline marked as exhibit 2.

The panel made its decision based on the record made available by both parties, arguments made at the reconsideration hearing on August 23, 2011, and the following analysis.

### ARGUMENTS

1. Heselton reiterated the contents of the June 30<sup>th</sup> letter. Additionally, Heselton stated after sending the solicitation fax on May 9, 2011, it made two phone calls to Safety Signs and Nagel Sod, two DBEs who submitted quotes on the Project. Mr. Gorman stated that he called two DBE firms and told them to submit their bids ahead of time so that he could enter the numbers in a timely manner.<sup>5</sup>

2. Restating the argument in the June 30<sup>th</sup> letter, Heselton argued there are no guidelines to determine whether a higher bid is reasonable, excessive or unreasonable. Mr. Gorman expressed his personal opinion that any bid that is higher than the low bid would be unreasonable.<sup>6</sup> Heselton submitted that Safety Signs bid for traffic control, signage and mail box items was 29% higher, Highway Solutions bid for 2 items out of 8 were incomplete and was still 98% higher, Nagel Sod's bid for seeding and erosion control items was 31% higher, Stone Brook Fence's combined bid for the fencing items was 717% higher, and Reiner Contracting combined bid for the sawing items was 83% higher than the lowest bids it received for the same items.<sup>7</sup> Based on these figures, Heselton argued all DBE quotes were excessively high.<sup>8</sup>

3. Heselton also argued that it disagreed with the idea of trying to "shop" the bids Received from low bidders to other bidders (DBE or non-DBE).<sup>9</sup> Heselton argued that it had a duty to accept bids from subcontractors in the strictest confidence and not reveal their bids to their competitors.<sup>10</sup> Heselton pointed out to a discrepancy in the contract solicitation documents and referred to two different DBE goals - 5% and 2.1% - and stated this discrepancy was not clarified before the submission due date.<sup>11</sup>

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<sup>5</sup> Tr. 15-16.

<sup>6</sup> Tr. 12, 14.

<sup>7</sup> Letter dated June 30, 2011 at p. 2; Tr. 12-13.

<sup>8</sup> Tr. 12.

<sup>9</sup> June 30<sup>th</sup> letter at p. 3; Tr. 10-11.

<sup>10</sup> June 30<sup>th</sup> letter at p. 3; Tr. 11.

<sup>11</sup> June 30<sup>th</sup> letter at p. 1; Tr. 7

4. MnDOT OCR submitted that the explanations and facts in Heselton's June 30 letter were not available to the MnDOT OCR as of the submission due date and was offered after MnDOT OCR's bid-rejection letter was sent out.

5. MnDOT OCR further submitted that Heselton's solicitation fax dated May 9, 2011 sent to the DBEs neither provided a specific DBE goal on the Project nor described or identified the specific work that Heselton was interested in subcontracting.<sup>12</sup>

6. MnDOT OCR responded to Heselton's rejection of bid shopping idea by arguing that the federal regulations characterize negotiation with subcontractors in a much broader context than bid shopping. According to MnDOT OCR, the federal regulations require negotiations that happen in other facets of business in the exercise of good business judgment and these negotiations could happen not only with the DBEs but also with the non-DBEs.<sup>13</sup>

7. MnDOT OCR argued that Heselton failed to follow up with any of the 18 DBEs who did not respond to the May 9 solicitation fax.<sup>14</sup> MnDOT OCR further argued that given the DBE quotes that Heselton received for striping, signing, and traffic control it would have been reasonable to at least have pursued further negotiations with the DBEs who submitted quotes or even award to those DBEs.<sup>15</sup>

8. Responding to Heselton's argument about reasonableness of the DBE quotes, MnDOT OCR argued that in determining whether the price is reasonable or not, it considers several factors: total size of the Project; scope of the work; and a comparison of the DBE price versus non-DBE price. MnDOT OCR submitted that it decides the reasonableness of a quote by looking at a combination of factors and not a mere percentage analysis.<sup>16</sup>

#### **PANEL'S FINDINGS AND CONCLUSIONS OF LAW**

1. Heselton sent out the solicitation fax on May 9, 2011 at 2 p.m. and asked for quotes by 7 a.m. on May 12, 2011. There was no evidence of follow up action with the 18 DBEs who did not respond to the solicitation. The panel will not consider Heselton's evidence of two phone calls to Safety Signs and Nagel Sods. This information was not made available to

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<sup>12</sup> Tr. 21

<sup>13</sup> Tr. 25.

<sup>14</sup> Tr. 20.

<sup>15</sup> Tr. 28.

<sup>16</sup> Tr. 27-29.

MnDOT OCR by the submission due date and therefore was not a part of the initial record that MnDOT OCR considered. Even if the panel considered this evidence, making these two phone calls did not satisfy the prime contractor's obligation to "actively and aggressively" pursue DBE participation under the federal regulations. This is the only follow up action that Heselton took to encourage DBE participation in the Project. There are many other actions that Heselton could have taken to gain DBE participation, but Heselton did not provide any such evidence to the MnDOT OCR. Accordingly, the panel finds that Heselton failed to solicit the interested DBEs actively and aggressively, and within sufficient time to allow the DBEs to respond to the solicitation.

2. Heselton did not provide any evidence of meaningful follow up action with the 5 DBEs who submitted quotes. Accordingly, the panel finds that Heselton failed to follow up or negotiate in good faith with the interested DBEs as required by the federal regulations.

3. Panel agrees with MnDOT OCR's analysis for determining reasonableness by looking at a combination of factors such as total size of the Project, scope of the work, and a comparison of the DBE price versus non-DBE price rather than a mere percentage analysis that Heselton adopted. Accordingly, the panel concludes that Heselton should have awarded at least some of the DBEs who quoted a slightly higher price, or in the least, should have entered into negotiations with the interested DBEs.

4. The average DBE participation of the other bidders on the Project was 1.65%.<sup>17</sup> This figure is indicative of the potential for DBE participation in the Project. Heselton's DBE commitment of 0% is less than the average DBE participation obtained by the other bidders. Panel finds that the discrepancy regarding the DBE goal (5% or 2.1%) that Heselton noted would not have changed the outcome of the MnDOT OCR decision because Heselton's DBE commitment was 0% and its efforts to recruit DBEs was far from being adequate. Heselton did not present any evidence that its lack of effort to recruit DBEs was due to uncertainty about the DBE goal.

5. Panel agrees with the distinction that MnDOT OCR draws between bid-shopping and negotiating in good faith with the DBEs. Bid-shopping occurs when a contractor divulges a subcontractor's bid to other potential subcontractors to obtain lower bids from them. This is not the same as negotiating with a DBE. A prime contractor can enter into negotiations with a DBE in good faith without divulging the solicited bids or the prices. A DBE may quote a higher price due to a misunderstanding of the exact scope of the work involved; A DBE may be able to quote a lower price if it is able to quote only for portions of the work by de-bundling; A DBE may also be able to quote a lower price if it has some assistance in obtaining bonding, lines of credit or

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<sup>17</sup> MnDOT OCR's bid rejection letter p. 8.

insurance as required by MnDOT or the contractor; It is also possible that a DBE may be able to quote a lower price if assistance to obtain necessary equipment, supplies, or materials is provided. A prime contractor cannot find out these circumstances unless it enters into discussions and negotiations with the DBEs who are interested. Such efforts require organized, good faith attempts by the prime contractor. The type of effort that Heselton made in this case – sending out a pro-forma solicitation fax just 3 days before the bid letting – clearly fell short of the good faith efforts envisaged by the federal regulations. As noted above, Heselton argued that negotiations with DBEs amounted to bid-shopping. Negotiations per se are not bid-shopping. Heselton presented no evidence of any negotiations.

6. This panel has previously held that when a DBE has expressed interest, a contractor who is aggressively attempting to meet a DBE goal should take additional steps to obtain that DBEs participation or to determine conclusively that the DBE will not participate.<sup>18</sup> Heselton could have avoided the difficulty they would encounter in the last minute negotiating with the interested DBEs regarding the price and de-bundling if it engaged in the DBE solicitation in a timely manner by giving the DBEs an earlier deadline to submit their bids.

7. The panel recognizes the additional efforts that would be required of Heselton (or any other prime contractor) to take necessary and reasonable steps to obtain DBE participation. The panel has also considered Heselton's risk of losing a contract by accepting a higher bid from a DBE over the lower bid of a non-DBE. The need for these additional efforts and higher risk of losing a contract are inherent in the bidding process, and consequential to the obligations that are imposed by the federal law.

8. The federal regulations state that one of the permissible factors in determining good faith efforts is whether the bidder negotiated in good faith with interested DBEs. Heselton, however, has characterized such negotiations as "bid shopping." In Minnesota, there is nothing to prevent a prime contractor from legally negotiating a lower price with a subcontractor even after the award of the contract. A prime contractor can also do so ethically, if it does not divulge the bids or prices obtained from the subcontractors. In *Holman Erect. Co. v. Orville E. Madsen & Sons*, 330 NW 2d 693 (Minn., 1983), a prime contractor having obtained a bid from the appellant, (Holman) listed Holman as a proposed subcontractor. After the city of Moorhead, Minnesota awarded the contract to the prime contractor, the prime contractor negotiated with another subcontractor the same work that Holman quoted. Holman sued the prime contractor for breach of contract and the Minnesota Supreme Court rejected Holman's claim. The Court held, listing Holman as a

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<sup>18</sup> Panel Decision in the Administrative Reconsideration Hearing Request by Knife River Materials - Northern Minnesota Division dated February 14, 2011 Pursuant to 49 C.F.R. Part 26 S.P. 0302-72 (TRP/271/DBE/2011).

proposed subcontractor did not create a contract between the prime contractor and Holman. In *Holman*, the Minnesota Supreme Court analyzed in detail, why a subcontractor is held to perform as quoted to the prime contractor but not *vice versa*. Therefore, it is clear that Heselton could have legally negotiated with the DBE subcontractors interested in this Project. As this panel has previously emphasized, the DBE program is remedial in nature<sup>19</sup> and requires bidders to take some actions that they might not otherwise take or might not prefer to take.

### Decision

The Panel concludes that Heselton was neither responsive nor responsible as required by 49 C.F.R. Part 26. MnDOT OCR's determination dated June 23, 2011, rejecting Heselton's bid as non-responsible as of the Submission Due Date is affirmed.

Aug 30, 2011

Date

James R. Cownie

James R. Cownie

For the MnDOT Administrative Reconsideration Panel  
of August 23, 2011.

<sup>19</sup> Panel Decision in the Administrative Reconsideration Hearing Request by Hoover Company dated June 15, 2011 TRP/275/DBE/2011.